

June 2, 1993

Mr. Gary S. Hamada, Administrator
Disability Compensation Division
Department of Labor & Industrial Relations
P. O. Box 3769
Honolulu, Hawaii 96812-3769

Dear Mr. Hamada:

Re: Workers' Compensation Captive Insurance's Annual Report

This is in response to your letter to the Office of Information Practices ("OIP") dated March 8, 1993. In your letter, you requested an advisory opinion concerning whether the above-referenced report must be made available for inspection and copying under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

ISSUE PRESENTED

Whether, under the UIPA, the Workers' Compensation Captive Insurance's Annual Reports ("Annual Report") maintained by the Department of Labor and Industrial Relations ("DLIR"), Disability Compensation Division ("DCD"), must be made available, upon request, for inspection and copying.

BRIEF ANSWER

Yes. Our review of the UIPA exceptions to required agency disclosure contained in section 92F-13, Hawaii Revised Statutes, reveals that none of the UIPA exceptions apply to permit the DCD to withhold public access to the Annual Reports. In particular, the Annual Report does not contain any personal information about individuals. Thus, we believe that the disclosure of the Annual Report, would not "constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. 92F-13(1) (Supp. 1992).

In addition, although the Annual Report does contain the names and DLIR-assigned case numbers of the captive insurer's "doing business as" entities ("DBAs"), divisions, and

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subsidiaries, we do not believe that this information constitutes "confidential" commercial or financial information. Moreover, the disclosure of the number of cases and the total amounts of the captive insurer's benefits paid under the workers' compensation program, as well as the amounts of future liabilities would not, in our opinion, impair the DCD's ability to obtain necessary information from the captive insurers in the future or cause substantial harm to the captive insurers submitting the Annual Reports. See National Parks & Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Accordingly, the information provided by captive insurers which is included in the Annual Report does not constitute "confidential" commercial or financial information protected under the UIPA's "frustration of a legitimate government function" exception provided in section 92F-13(3), Hawaii Revised Statutes.

Absent any other applicable UIPA exceptions, we conclude that the Annual Reports maintained by the DCD must be made available, upon request, for public inspection and copying under the UIPA.

FACTS

The DCD administers employee benefit programs to assist employees who suffer from on-the-job and off-the-job injuries or illnesses.

Under section 386-121, Hawaii Revised Statutes, all non-public employers in the State of Hawaii are required to provide for the payment of workers' compensation to their employees. Section 386-121(a)(5), Hawaii Revised Statutes, provides that non-public employers may provide such workers' compensation "[b]y membership in a workers' compensation group insured by a captive insurer under chapter 431, article 19."

Each year, captive insurance companies providing workers' compensation under section 386-121, Hawaii Revised Statutes, must submit to the DCD a "Workers' Compensation Captive Insurance's Annual Report" (WC-23). This Annual Report, a copy of which is attached as Exhibit A, contains the following information:

1. Name of the captive insurer.
2. Name, title, address, and telephone number of the individual responsible for the captive insurance program.
3. Name, title, address, and telephone number of the

individual responsible for the captive insurer's claims administration or if the claims are administered by an outside organization, the name of the organization, the name of the administrator, address, and telephone number.

4. Name, relationship of the captive insurer and account number issued by the DLIR to the captive insurer, and all DBAs, divisions, and subsidiaries included in its workers' compensation captive insurance plan.
5. Name, effective date, and DLIR account number of all additions of DBAs, divisions, and subsidiaries during the current year.
6. Name, effective date, and DLIR account number of all deletions of DBAs, divisions, and subsidiaries during the current year, as well as reason for deletion. Also, name and DLIR account number of party liable for claims occurring prior to effective date.
7. Yes/no answer concerning whether the workers' compensation self-insurance program is supplemented by an insurance policy.
8. The following information regarding cases and benefits reported in prior years that are open at year end and all cases reported during the current year:
 - a) number of cases;
 - b) amount of incurred liability for indemnity and medical benefits;
 - c) less the amount paid to date for indemnity and medical benefits;
 - d) amount of estimated future liability for indemnity and medical benefits; and
 - e) total estimated future liability.
9. Amount of benefits paid during the current year for indemnity and medical benefits.
10. Signature of company officer, title, and date of

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signature.

The captive insurer is also required to attach a copy of its latest Independent Audit Report to the Annual Report. However, your office has informed us that the Independent Audit Reports from captive insurers are considered separate records from the Annual Report. Thus, your office has requested an advisory opinion concerning the disclosure of the Annual Report only.

By a letter dated February 17, 1993, Mr. George Waialeale of the International Brotherhood of Electrical Workers requested the DCD to provide him with a copy of the 1992 Workers' Compensation Captive Insurance's Annual Report filed with the DCD by Hawaiian Telephone Company. The DCD subsequently requested an advisory opinion from the OIP concerning whether the Annual Report should be made available for public inspection and copying under the UIPA.

DISCUSSION

I. INTRODUCTION

The UIPA begins with the general premise that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. 92F-11(a) (Supp. 1992). If none of the five UIPA exceptions to disclosure contained in section 92F-13, Hawaii Revised Statutes, apply to the records requested, an agency must make the records available for inspection and copying. Haw. Rev. Stat. 92F-11(b) (Supp. 1992); Kaapu v. Aloha Tower Development Corp., ___ Haw. ___, No. 15775 (Feb. 25, 1993).

Section 92F-13, Hawaii Revised Statutes, states in pertinent part:

**[92F-13] Government records;
exceptions to general rule.** This chapter
shall not require disclosure of:

- (1) Government records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy;
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- (3) Government records that, by their nature, must be confidential in

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order for the government to avoid
the frustration of a legitimate
government function;

Haw. Rev. Stat. 92F-13(1), (3) (Supp. 1992).

For purposes of clarity, we will address the applicability of these UIPA exceptions separately.

II. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

Section 92F-14, Hawaii Revised Statutes, provides additional guidance concerning the UIPA's "clearly unwarranted invasion of personal privacy" exception contained in section 92F-13(1), Hawaii Revised Statutes. Specifically, section 92F-14(a), Hawaii Revised Statutes, states that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Examples of information in which an individual has a significant privacy interest are provided in section 92F-14(b), Hawaii Revised Statutes. Unless an individual's privacy interest is "significant," "a scintilla of public interest in disclosure will preclude a finding of a clearly unwarranted invasion of personal privacy." S. Conf. Comm. Rep. No. 235, 14th Leg., 1988 Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., Haw. H.J. 817, 818 (1988).

One of the examples listed in section 92F-14(b), Hawaii Revised Statutes, covers "[i]nformation describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness." Haw. Rev. Stat. 92F-14(b)(6) (Supp. 1992). Although the Annual Report requires captive insurers to provide information about their DBAs, divisions, and subsidiaries, the UIPA's personal privacy exception only applies to "individuals," or "natural persons." See Haw. Rev. Stat. 92F-3 (Supp. 1992); see also OIP Op. Ltr. No. 92-17 (Sept. 2, 1992). In addition, the information provided concerning the cases and benefits do not identify the individuals claiming benefits under the workers' compensation program, therefore, section 92F-14(b)(6), Hawaii Revised Statutes, does not apply to this information. See OIP Op. Ltr. No. 91-24 at 5 (Nov. 26, 1991).

The DLIR also expressed concern regarding the disclosure of the names, addresses, and telephone numbers of individuals responsible for the captive insurance programs and the individuals responsible for claims administration. In previous OIP advisory opinions, we have stated that an individual's

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business address and business telephone number are not protected under the UIPA's personal privacy exception. See OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) (business addresses and telephone numbers of seminar attendees are public); OIP Op. Ltr. No. 91-1 (Feb. 15, 1991) (business addresses provided on license applications are public); OIP Op. Ltr. No. 91-8 (June 24, 1991) (no personal privacy protection for business addresses and telephone numbers of nominees for boards and commissions). Further, the disclosure of the names of the individuals responsible for the program and for claims administration would not result in a clearly unwarranted invasion of personal privacy because this information is not personal in nature.

Accordingly, our review of the sample Annual Report does not reveal any information contained within it that would, if disclosed, "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

III. FRUSTRATION OF A LEGITIMATE GOVERNMENT FUNCTION

Next, we turn to examine the UIPA's "frustration of a legitimate government function" exception. In the legislative history of the UIPA, the Legislature also provided a list of examples of information that may be protected under this UIPA exception. One of the examples given is "confidential commercial and financial information." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1095 (1988). See also Kaapu v. Aloha Tower Development Corp., ___ Haw. ___, No. 15775 (Feb. 25, 1993).

The federal Freedom of Information Act ("FOIA") contains a similar exemption to required disclosure for "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. 552(b)(4) (1988). Thus, we find it helpful to review case law interpreting FOIA's Exemption 4 when determining whether commercial and financial information may be withheld under the UIPA's "frustration of a legitimate government function" exception.

Although the names and DLIR-assigned account numbers of the captive insurer's DBAs, divisions, and subsidiaries are not "confidential" or "commercial" information, we believe that financial information in the Annual Report such as the total dollar amount of benefits paid and the future liability of the captive insurer requires closer inspection.

The D.C. Circuit Court of Appeals, in National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), set forth a two-part test used to determine whether commercial or

financial information is "confidential":

[C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks at 770.

Although this two-part test was challenged recently in Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992), the D.C. Circuit reaffirmed the National Parks test for confidentiality, but confined the test to information that persons are required to provide the government.¹

Because a captive insurer is required to provide the DLIR with information concerning the dollar amount of benefits paid and future liabilities in order to continue its workers' compensation program, we believe that the application of the National Parks two-part test to the facts before us would be instructive.

We first note that the total amount of benefits paid and future liabilities are merely general figures and do not reveal specific information about the individual compensation cases. Further, under section 431:19-102(a)(1), Hawaii Revised Statutes, captive insurance companies may not insure "any risks other than those of its parent and affiliated companies." Therefore, in our opinion, disclosure of this generalized information would not cause substantial harm to the competitive position of the captive insurer. Additionally, because captive insurers are required to file Annual Reports with the DLIR, we do not believe that disclosure of this information will impair the DCD's ability to obtain necessary information in the future.

Based upon the National Parks two-part test, we believe that the information provided by the captive insurers in the Annual Report, while arguably commercial and financial, is not confidential. Accordingly, in our opinion, the disclosure of the Annual Report would not result in the frustration of a legitimate

¹The OIP has not yet had occasion to examine other aspects of the Critical Mass decision, and because it is unnecessary for us to do so in this opinion, we shall address these aspects at a later date.

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government function under section 92F-13(3), Hawaii Revised Statutes.

Because there are no other UIPA exceptions to required agency disclosure applicable to the Annual Report, we conclude that the Annual Report must be made available, under the UIPA, for public inspection and copying upon request.

CONCLUSION

The information contained in the Annual Report is not protected under the UIPA's exception for personal privacy because the disclosure of this information would not reveal personal information about any individual. Further, we believe that the disclosure of the Annual Report would not result in the "frustration of a legitimate government function" because the information contained within the Annual Report does not constitute "confidential" commercial or financial information. In our opinion, the Annual Report must be made available, upon request, for public inspection and copying under the UIPA.

Very truly yours,

Stella M. Lee
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

SML:sc
Attachment
c: Dayton Nakanelua
Director, DLIR